ABBAS ISMAIL ROWLAND

v.

INSTITUT ANALISA SOSIAL (INSAN) & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. P. 825 OF 1983]
27 JUNE 1984

TORT: *Defamation - Libel - Article alleging plaintiff's abuse of his powers - Published in defendants' magazine - Article reproduced from affidavits for use in two pending actions against the plaintiff - Defence of qualified privilege - Whether documents are public - Affidavits referred to in Open Court at preliminary hearing.*

The defendants published an article in their magazine alleging that the plaintiff had abused his powers when he was the Deputy Public Prosecutor, by inducing, threatening and cheating three villagers to sell their land to him below the market value. The article was reproduced from affidavits made by the three villagers for use in two related pending actions. The preliminary hearing had been held and the affidavits referred to in Open Court in those actions. The defendants claimed qualified privilege.

Held:

[1] Since the affidavits were not used exclusively for arguments in Chambers but that they were referred to in Open Court as well, this fact alters the nature of the affidavits in that they have now become public documents.

[Plaintiff's application dismissed with costs.]

Cases referred to:

Cadam & Ors. v. Beaverbrook Newspaper [1959] 1 All ER 457
Golden Century Development Sdn. Bhd. & Anor. v. Gandhoe & Anor. [1983] 1 MLJ 86

Legislation referred to:

Rules of the High Court 1980, O. 18 r. 19, O. 81 r. 1

For the plaintiff - Yusuf Khan; M/s Yusuf, Gulam & Lee
For the defendants - G.S. Nijar; M/s Nijar & Nijar

JUDGMENT

Siti Norma Yaakob J:

In this libel suit, the plaintiff, an Advocate and Solicitor avers that the defendants had published an article in their magazine called 'Nadi Insan', alleging that he had abused his powers when he was the Deputy Public Prosecutor, Johor, by inducing, threatening and cheating three villagers in Pulau Tioman, to sell their land to him well below the market price. The article relating to the infamous transaction was reproduced by the defendants from affidavits made by the three villagers for use in two related pending actions in the High Court at Johor Baru and Kuantan.

The original Statement of Defence was amended twice, and it is the second amendment, the Re-Amended Statement of Defence that the plaintiff sought to set aside under O. 18 r. 19 of the Rules of the High Court, 1980, and under the inherent jurisdiction of the Court.

The Re-Amended Statement of Defence raised 3 defences (1) qualified privilege, (2) justification, and (3) the action is premature. Counsel for the defendants concede that he was forced to add the third defence in view of the plaintiff's application but he was mindful

of the fact that he should proceed by way of summons in Chambers to have the proceedings in this action stayed pending the outcome of the two related actions in Johor Baru and Kuantan.

It is not disputed that the alleged libel was reproduced by the defendants from affidavits sworn by the three villagers in the two pending actions in Johor Baru and Kuantan. However, what is disputed is whether the affidavits are public documents as to avail the defendants of the defence of qualified privilege. The plaintiff maintains that the 3 affidavits are not public documents as they were only referred to in preliminary hearings in Chambers before the Judges in Johor Baru and Kuantan. The minutes of the proceedings from the Judges' Note Books in the 2 pending actions show that as far as the preliminary hearing before the Judge in Johor Baru, it started off as a Chamber application for summary judgment under O. 81 r. 1 of the Rules of the High Court 1980 but as there were contentious allegations contained in the affidavits, the Judge adjourned the application for arguments into Open Court. In the Kuantan High Court, the preliminary hearing was in fact conducted in Open Court and references were made to the affidavits of the three villagers. From this it follows that the affidavits were not used exclusively for arguments in Chambers but that they were referred to in Open Court as well and this fact alters the nature of the affidavits in that they have now become public documents.

The plaintiff also contends that the defendants could not avail themselves of the defence of qualified privilege as they have been actuated by malice in publishing the libel. The issue as to whether malice is present or not can only be determined by evidence and I do not consider it is proper that on the mere reading of the Re-Amended Statement of Defence and the affidavits filed in support of this application, malice can be presumed.

For their defence of justification, the defendants relied on the case of *Cadam & Ors. v. Beaverbrook Newspaper* [1959] 1 All ER 457, to resist of the plaintiff's application. In that case, the newspaper reproduced the contents of a writ which contained references to conduct defamatory of the plaintiffs. The defendant raised the defence of justification and the issue before the Court of Appeal was whether this defence can be struck off. The Court ruled that it was an arguable defence which must go for trial. The only difference between *Cadam's* case and the case before me is that in *Cadam's* case, the defendants reproduced the contents of the writ whereas the defendants before me reproduced the contents of three affidavits. On the same token, I cannot altogether shut out the defendants from establishing the truth or otherwise of the libel and this is only possible by going through the motions of a trial, even though in this case the words complained of were reproduced from affidavits.

Counsel for the plaintiff went to great lengths to cite to me a number of cases in support of his application but as the cases cited were decided on evidence adduced at their trials, I do not consider that at this point of time, such cases are relevant for an application of this nature. Moreover, the Federal Court has held in the case of *Golden Century Development Sdn. Bhd. & Anor. v. Gandhoe & Anor.* [1983] 1 MLJ 86, that the summary procedure under O. 18 r. 19 can only be adopted where it is clearly seen that a claim or answer is on the face of it is obviously unsustainable. In this case on the affidavits filed both in support and in answer to the application, there are issues raised not only on the facts but on the law which can only be properly determined by a trial. Nothing short of this will suffice and on that very basis, I had accordingly dismissed the plaintiff's application with costs.

Also found at [1985] 1 CLJ 440